

Internal Revenue Service  
**memorandum**

CC:TL-N-3379-88  
Brl:CEButterfield

date: **FEB 22 1988**

to: District Counsel, Denver

CC:DEN

from: Director, Tax Litigation Division

CC:TL

subject: [REDACTED]

This is in response to your request for technical advice dated February 9, 1988. This memorandum confirms the oral authorization already provided to you, to settle the above-captioned case.

ISSUE

Whether petitioners could be awarded their \$ [REDACTED] filing fee, and [REDACTED] hours of attorneys' fees at \$ [REDACTED] per hour, in settlement. RIRA No. 7430.00-00.

CONCLUSION

As Ms. Butterfield of our office already advised Mr. Lang, by telephone conversation of February 17, 1988, the \$ [REDACTED] in fees and costs may be awarded under I.R.C. § 7430, in settlement of this case.

FACTS

Taxpayers were subject to an audit on their [REDACTED] return. The agent conducting the audit requested that they gather certain documentation for deductions shown on the return, for his review. They cooperated fully. Due to an auto accident, the agent cancelled his appointment to review the documents. He did not communicate further with the taxpayers for eight months. After those eight months, and several failed attempts to contact the taxpayers by telephone, he sent them a form to waive the statute of limitations. They declined to execute the waiver without the agent's first reviewing the documentation they had gathered eight months earlier at his request. He refused to do so without the waiver. Therefore a notice of deficiency was issued, dated [REDACTED], in the amount of \$ [REDACTED]. After the petition was filed the same agent conducted a review of the documentation the taxpayers had compiled at the beginning of the

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audit. The final deficiency based on that review was conceded to be \$[REDACTED]. Taxpayers' counsel has offered a settlement conceding the \$[REDACTED] deficiency in exchange for \$[REDACTED] in fees and costs.

#### LEGAL ANALYSIS

Section 7430 allows the court to award fees and costs to successful petitioners in civil actions under the Code. In order to be entitled to fees in post-1986 cases the petitioner must show that the government's position, after District Counsel became involved, was not-substantially justified. To be successful, petitioners must show that they substantially prevailed. In this case there is no question that they will have done so. It appears from the facts you have provided to us that this case was not conceded in the answer, but fairly shortly thereafter (within a matter of months), after Appeals had obtained the requested review of the documentation by the Revenue Officer. The objectionable conduct, therefore, took place before the filing of the petition, and before the involvement of District Counsel, placing it technically outside the scope of an award under section 7430. The Tax Court has said that only the post-petition position of the government is subject to their review under this section, unless District Counsel was involved at an earlier date. Sner v. Commissioner, 89 T.C. No. 9 (July 9, 1987); Shifman v. Commissioner, T.C. Memo. 1987-347.

The court has found on some occasions, however, that if concession was unreasonably delayed, the delay itself will give rise to an award of fees under section 7430. Stieha v. Commissioner, 89 T.C. No. 55 (October 8, 1987). The somewhat high-handed conduct at the administrative level in this case could lead the court to look for any basis on which to make an award. They might therefore find that the mere failure to concede in the answer, or within a few weeks thereafter, created an unjustifiable delay. Such a conclusion would undercut the recent Tax Court opinions under section 7430, which have run heavily in our favor. It would also shorten the time in which District Counsel attorneys must concede similar cases to a very burdensome degree. Therefore there are some litigation hazards present. In addition, while we do not have a de minimus test for settlement of these cases, litigation over the fee issue after failure to settle for such a small amount would portray the Service in a very unfavorable light, particularly where the taxpayers have been cooperative from the outset. Therefore, we have authorized the settlement of this case for the award of \$[REDACTED]. Attached please find an award data sheet, which you may submit to us with the final decision document, so that we can request payment from the General Accounting Office.

If we may be of further assistance in this matter, please do not hesitate to call Ms. Clare E. Butterfield, at (FTS) 566-3442.

MARLENE GROSS

By:



GERALD M. HORAN  
Senior Technician Reviewer  
Branch No. 1  
Tax Litigation Division

Attachment (1):  
Award Data Sheet